

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105**

In the Matter of:)
)
Borla Performance Industries, Inc.,)
) Docket No. CAA-R9-2020-0044
Respondent.)
_____)

ANSWER TO SECOND AMENDED COMPLAINT

Pursuant to the consolidated Rules of Practice, 40 C.F.R. § 22.15, Respondent Borla Performance Industries, Inc. (“Respondent” or “Borla”), by counsel, offers the following Answer to the U.S. Environmental Protection Agency’s Second Amended Complaint.

RESPONSES TO NUMBERED PARAGRAPHS¹

1. Denied, as this paragraph consists of a legal conclusion to which no response is required.
2. Denied, as this paragraph consists of a legal conclusion to which no response is required.
3. Admitted.
4. Denied that Respondent provided information to Complainant that shows Respondent violated the CAA. Otherwise, without information and knowledge.

Jurisdiction

5. Admitted only that the Second Amended Complaint speaks for itself. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is needed.
6. Denied, as this paragraph consists of a legal conclusion to which no response is needed.

¹ The Second Amended Complaint contains headings and subheadings. To the extent that a response may be required, Respondent denies every allegation in each Second Amended Complaint heading or subheading.

7. Admitted that EPA and Respondent executed and entered into a Tolling Agreement and that Tolling Agreement speaks for itself; otherwise, denied.

8. Denied, as this paragraph consists of a legal conclusion to which no response is needed.

9. Without knowledge or information.

Governing Law

10. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

11. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

12. Denied.

13. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

14. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

15. Without knowledge or information.

16. Without knowledge or information.

17. Without knowledge or information.

18. Without knowledge or information.

19. Without knowledge or information.

20. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

*EPA's Certificate of Conformity Program for New Motor Vehicles
and Motor Vehicle Engines*

21. Denied, as this paragraph consists of a legal conclusion to which no response is required.

22. Denied, as this paragraph consists of a legal conclusion to which no response is required.

23. Denied, as this paragraph consists of a legal conclusion to which no response is required.

24. Denied, as this paragraph consists of a legal conclusion to which no response is required.

25. Denied, as this paragraph consists of a legal conclusion to which no response is required.

Emissions-Related Elements of Design

26. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

27. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

28. Denied that catalytic converters are an emission related part and element of design because that statement is a legal conclusion to which no response is required. Otherwise, without knowledge or information.

Acts Prohibited by Section 203(a)(3)(B) of the Clean Air Act

29. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

30. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

31. Denied, as this consists of a legal conclusion to which no response is required.

32. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

33. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

General Allegations

Motor Vehicle Emissions-Related Elements of Design

- 34. Admitted.
- 35. Without information or knowledge.
- 36. Without information or knowledge.
- 37. Without information or knowledge.
- 38. Without information or knowledge.
- 39. Without information or knowledge.
- 40. Without information or knowledge.
- 41. Without information or knowledge.
- 42. Without information or knowledge.
- 43. Without information or knowledge.
- 44. Without information or knowledge.

45. Without information or knowledge.

46. Denied, as this paragraph consists of a legal conclusion to which no response is required. Otherwise, without information or knowledge.

The Type of Defeat Device at Issue

47. Denied with respect to Respondent; otherwise, without information or knowledge.

48. Without information or knowledge.

49. Denied that Respondent's January 31, 2018 response was seriously inadequate. Otherwise, admitted.

50. Admitted only that Borla's October 29, 2018 response included an Excel spreadsheet that included a column entitled "Function"; that EPA's request speaks for itself; and that EPA attached excerpts from the Excel spreadsheet as Attachment A to the Second Amended Complaint.

51. Denied.

52. Denied.

53. Admitted that Respondent has previously sold or offered for sale the products identified in Appendix A through its website. Denied that the products identified in Appendix A are Exhaust System Defeat Devices.

54. Admitted that EPA issued a Notice of Violation and that the Notice of Violation speaks for itself; otherwise, denied.

COUNT ONE

Violation for Manufacture and/or Sale and/or Offer for Sale of Exhaust System Defeat Devices

55. Respondent restates its responses to the preceding Paragraphs.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied, as this paragraph consists of a legal conclusion to which no response is required.

61. Denied.

62. Denied.

63. Denied that Respondent has violated section 203(a)(3)(B) of the CAA or that any penalties should be assessed against Respondent; otherwise, without information our knowledge.

64. Admitted that the Second Amended Complaint makes no specific penalty demand. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

65. Denied that Respondent is subject to any civil penalties; otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

66. Denied that Respondent is subject to any civil penalties; otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

67. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

68. Admitted only that the 2021 Penalty Policy speaks for itself. Denied that Respondent is subject to any civil penalties; otherwise, without information or knowledge.

GENERAL STATEMENT OF DENIAL

To the extent that Respondent failed to answer any allegation of fact—material or otherwise—Respondent denies those allegations.

DEFENSES

Without assuming any burden beyond what it would otherwise bear under applicable law, Respondent asserts the following defenses to the Second Amended Complaint:

First Defense: EPA lacks statutory authority to enforce the Clean Air Act against Borla.

Borla's products were designed and intended to be used, and sold for restricted use, only in vehicles designed, intended, and used solely for competition, which vehicles were not included by Congress in the portions of the Clean Air Act under which EPA brings its claims. Accordingly, neither the Clean Air Act nor its valid implementing regulations give the EPA enforcement power over Borla's conduct.

Second Defense: EPA's interpretation of the statutory provisions on which it bases its allegations is incorrect as a matter of law and is not entitled to any deference.

EPA's interpretation and application of Section 203(a)(3)(B) and other provisions of the Clean Air Act, including the term "motor vehicle," is not consistent with the statutory language or involves ambiguous language, and is not entitled to deference.

Third Defense: EPA cannot meet its burden to demonstrate a violation of Section 203(a)(3)(B) of the Clean Air Act by Respondent.

EPA bears the burden to demonstrate actionable violations of Section 203(a)(3)(B) of the Clean Air Act by Respondent. On the facts of this case, EPA cannot satisfy its burden, including but not limited to demonstrating that (a) the products identified in EPA's Amended Complaint were intended for use with "motor vehicles," (b) a principal effect of the identified products is to bypass, defeat, or render inoperative any device or element installed on or in a motor vehicle, or (c) that Respondent knew or should have known that any such product was being offered for sale or installed for such use or put to such use.

Fourth Defense: EPA's actions in pursuing enforcement against Respondent are inconsistent with its own guidance for pursuing administrative enforcement.

EPA has issued guidance (Susan Bodine, *Memorandum re Implementation of Executive Order 13924*, November 25, 2020), providing that its administrative enforcement proceedings must

comply with various practices designed to ensure due process, fairness, and lenity. EPA has failed to act consistently with the recommended practices in its own guidance in prosecution of this case, has failed to consider best practices, and thus has acted in an arbitrary and capricious manner.

Fifth Defense: Statute of Limitations

The Statute of Limitations bars the prosecution of all activities that occurred more than five years (plus any tolled period) before the valid initiation of these proceedings. 28 U.S.C. § 2462.

Sixth Defense: Violation of Separation of Powers

Insofar as the Clean Air Act is properly construed to delegate legislative powers to the EPA to resolve ambiguous provisions or to define illegal conduct, the Act violates Article III and is an improper delegation of legislative power.

Seventh Defense: Lack of Fair Notice

The EPA's decades-long practice of permitting conduct similar to that alleged in the Amended Complaint affirmatively misled Borla and the public or, at a minimum, failed to provide Borla notice that the EPA considered Borla's actions unlawful, making EPA's current enforcement action for pre-fair-notice conduct a violation of due process as protected by the Fifth Amendment. In addition, EPA's failure to publicly specify what actions a manufacturer must take for EPA to exercise its discretion not to enforce against racing-only sales likewise constituted a lack of fair notice or opportunity to seek such non-enforcement.

Eighth Defense: Violation of Due Process and Sixth Amendment Rights

Because the penalties proposed by EPA under the Second Amended Complaint are essentially penal in character, this proceeding violates Borla's Sixth Amendment rights to confrontation, compulsory process for obtaining witnesses, and a trial by jury and related procedural rights. It

would also violate a panoply of due process protections relating to the burden of proof, obligations to disclose adverse evidence, and others.

Ninth Defense: Violation of the Ex Post Facto Clause

Because the penalties proposed by EPA under the Second Amended Complaint are essentially penal in character, imposing them on Borla for conduct that was legal or otherwise permitted before the EPA's new interpretation and enforcement policy violates the Ex Post Facto Clause.

Tenth Defense: The Rule of Lenity

The Clean Air Act and regulations promulgated under its authority are ambiguous, particularly as applied to this case. Because the penalties proposed by EPA under the Second Amended Complaint are essentially penal in character, and because the terms of the statute and regulations can also determine application of criminal penalties under other provisions of the Act, those ambiguities should be resolved in Borla's favor.

**Eleventh Defense: Violation of Due Process and of the Seventh Amendment
Right to a Jury Trial**

Even if the penalties in this case are deemed "civil," this proceeding violates Borla's Seventh Amendment right to a jury determination of disputed issues of fact. That an executive officer part of the same agency seeking to impose fines is permitted near conclusive authority to resolve disputed issues of fact also constitutes a due process violation, notwithstanding the limited judicial review provided by the Administrative Procedure Act.

Twelfth Defense: Violation of the Excessive Fines Clause

The penalties EPA seeks against Borla are grossly disproportionate to the nature of the alleged offense and injury and thereby violate the Eighth Amendment's Excessive Fines Clause.

Thirteenth Defense: Arbitrary and Capricious Penalties

The EPA's selective enforcement of penalties assessed in the complaint are unreasonable, arbitrary, and capricious, contrary to the ultimate standard of review of EPA actions set forth in 5 U.S.C. § 706(2)(A).

Fourteenth Defense: Estoppel

Because the EPA has not consistently enforced these provisions of the Clean Air Act against parties engaged in the same or more egregious conduct than Borla, it is estopped from applying its new interpretation of the Clean Air Act retroactively.

Fifteenth Defense: Compliance with Laws

Civil penalties are not appropriate under the applicable facts because Borla at all relevant times was acting consistent with and in compliance with applicable laws and regulations.

Sixteenth Defense: Good Faith

Civil penalties are not appropriate because Borla at all relevant times acted in good faith and in reliance on its good faith understanding of the applicable statutory structure and ceased all of the actions at issue upon notice from EPA of EPA's enforcement interpretation.

Seventeenth Defense: EPA cannot demonstrate a legal or equitable basis for imposing civil penalties.

Civil penalties are not appropriate or should be substantially mitigated because EPA cannot demonstrate meaningful impacts associated with the alleged violations or an equitable basis for imposing a civil penalty, including harm to human health or the environment, economic benefit to Respondent, or a history of noncompliance by Respondent.

Eighteenth Defense: EPA cannot base its penalty calculation on the 2021 Penalty Policy.

EPA cannot rely on its *Clean Air Act Title II - Vehicle and Engine Civil Penalty Policy* (Jan. 2021) (“Penalty Policy”) for purposes of calculating or justifying a civil penalty because (a) the Penalty Policy is not listed on EPA’s Guidance Document Portal and thus under EPA’s recently enacted rules regarding guidance documents, guidance not included on the portal cannot be relied upon by the Agency except to establish historical facts. *See* 85 Fed. Reg. 66230, 66233 (Oct. 19, 2020) (implementing new rules at 40 C.F.R. Part 2); (b) the Penalty Policy and EPA’s application of the Penalty Policy in this case are not consistent with the applicable statutory penalty factors; and (c) the technical bases and assumptions used for calculation of certain recommended penalties in the Penalty Policy are not based on sound science with respect to environmental harm or relative impact and are not applicable to the specific factual circumstances in this case.

Nineteenth Defense: EPA’s adjudicatory structure and procedures violate the appointments clause and the separation of powers.

By permitting adjudication and internal appellate review by persons who constitute officers of the United States but who have not been properly appointed, and/or by restricting the removal and replacement of some or all of those officers, the process by which enforcement actions are adjudicated and appealed within the EPA violates the Appointments Clause and the separation of powers.

* * *

The pleading of the defenses described above shall not be construed as an undertaking by Respondent of any burden that would otherwise be the responsibility of the Complainant. Respondent has not waived any defenses and reserves its right to amend or supplement the above defenses or to delete and withdraw such defenses as may become necessary as the matter progresses.

RESPONDENT'S REQUEST FOR HEARING

Pursuant to the consolidated Rules of Practice, 40 C.F.R. § 22.15(c), Respondent requests a hearing in which it will contest (1) the Second Amended Complaint's allegations of material fact; (2) its applications of law; and (3) its proposed penalties.

PRAYER

Respondent asks that the Second Amended Complaint be withdrawn with prejudice in whole or in part, and for such other relief to which Respondent shows itself to be entitled.

Dated: March 29, 2021

Respectfully submitted,



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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 29th day of March 2021, I have served a true and correct copy of Respondent’s Answer to the U.S. EPA’s Second Amended Complaint as set forth below:

Copy by OALJ Electronic Filing System to:

Mary Angeles, Headquarters Hearing Clerk
United States Environmental Protection Agency
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